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Supreme Court Case No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

Luciano Pisoni Fabbrica
Accessori Instrumenti Musicali,
and Enzo Pizzi, Inc.,
Petitioners,

v.

The United States of America,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Larry Klayman
Michael C. Diedring
KLAYMAN & GURLEY, P.C.
529 14th Street, N.W.
Suite 979
Washington, D.C. 20045

Counsel for Petitioners

QUESTION PRESENTED

Whether the reviewing court erred when it found that the government had met its burden of showing that its actions were clearly reasonable, despite express findings by the trier of fact that Commerce's methodology was "unreasonable."

Whether the government had met its burden under the Equal Access to Justice Act of showing that its actions were "reasonable" such that petitioners should be denied their right to attorney's fees as the prevailing parties?

PARTIES BELOW

Parties in the United States Court of Appeals for the Federal Circuit were plaintiffs-appellants, Luciano Pisoni Fabbrica Accessori Instrumenti Musicali, and Enzo Pizzi, Inc., corporations with no publicly-held affiliates or subsidiaries;

and defendant-appellee, the United States of America.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Petitioners, Luciano Pisoni Fabbrica Accessori Instrumenti Musicale and Enzo Pizzi, Inc., pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Federal Circuit.

OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Federal Circuit is printed as Appendix A. The opinion of the U.S. Court of International Trade, reported at 658 F. Supp. 902 (CIT 1987), is printed as Appendix B. The related opinions in the underlying action on the merits, reported at 645 F. Supp. 956 (CIT 1986), and 640 F. Supp. 255 (CIT 1986), are reproduced as Appendix C and D, respectively.

JURISDICTION

The judgment of the U.S. Court of Appeals for the Federal Circuit was entered on January 20, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Equal Access to Justice Act ("EAJA") 28 U.S.C. § 2412(d)(1)(A) (Appendix E).

STATEMENT OF THE CASE

This dispute arose when the U.S. Department of Commerce ("Commerce") initiated an antidumping action against petitioners, Luciano Pisoni Fabbrica Accessori Instrumenti Musicale and Enzo Pizzi, Inc. (collectively "Pisoni"), who are, respectively, an Italian producer and an American importer of "pads" for woodwind instrument keys. Specifically, it was alleged that Pisoni were "dumping" these pads into the United States by selling them at prices below those at which they were sold in Italy. On September 12, 1984, Commerce issued an antidumping order regarding petitioners' pads, which is essentially an additional tariff imposed to offset the unfair pricing of the product in the United States.

In the U.S. Court of International Trade, Pisoni contested Commerce's findings, as

well as the findings of the International Trade Commission, which provided the basis of the antidumping order. The U.S. Court of International Trade specifically held "that Commerce's comparison of pads without allowing for differences in the physical characteristics of the different ranges of pad sizes was unreasonable and not in accordance with law." Luciano Pisoni Fabbrica Accessori v. United States, 640 F. Supp. 255, 260 (CIT 1986). Additionally, reasoning that Commerce should have used daily exchange rates in its currency conversion methodology, the Court stated that "[I]t is not reasonable for Commerce to find dumping by a firm with only ten relevant home market sales during the period of the investigation solely because of Commerce's use of quarterly exchange rates." Id. Thus, the Court made two

specific factual findings that Commerce acted unreasonably.

On remand, Commerce recalculated its figures applying the daily exchange rates as ordered, ultimately concluding that the dumping margin was de minimis, and that the pads were not being sold at less than fair value in the United States. The U.S. Court of International Trade affirmed and dismissed the case, Luciano Pisoni Fabbrica Accessori v. United States, 645 F. Supp. 956, 957 (CIT 1986), and Commerce revoked the part of the dumping order applicable to petitioners' pads. 51 Fed. Reg. 40,239 (1986).

Since it was the prevailing party, Pisoni applied for attorney's fees and expenses under the Equal Access to Justice Act ("EAJA"), 28 U.S.C. §2412(d)(1)(A). Finding that the government's actions were "substantially justified," the U.S. Court

of International Trade declined to award petitioners attorney's fees under the act. Luciano Pisoni Fabbrica Accessori v. United States, 658 F. Supp. 902, 907 (CIT 1987). On appeal, the U.S. Court of Appeals for the Federal Circuit affirmed, finding that the court's finding that the government's pcsition was substantially justified was not clearly erroneous. This appeal is from this decision.

REASONS FOR GRANTING THE WRIT

I. The Federal Circuit's Decision to Ignore an Express Finding by the Factfinder in the Underlying Action was Legally Incorrect, Contrary to the Express Congressional Intent in the Act, and in Conflict with the Position Taken by the D.C. Circuit.

The EAJA provides, in pertinent part, that "a court shall award to a prevailing party other than the United States fees and other expenses . . . incurred by that party in any civil action . . . brought by or against the United States . . . unless the

Court finds that the position of the United States was substantially justified." 28 U.S.C. §2412(d)(1)(A). Construing this phrase, the Federal Circuit has defined "substantially justified" to require "that the Government show that it was clearly reasonable in asserting its position, including its position at the agency level, in view of the law and the facts." Gavette v. Office of Personnel Management, 808 F.2d 1456, 1467 (Fed. Cir. 1986) (in banc).

In this case, despite two express findings on the merits that Commerce's actions were not reasonable, both the Court of International Trade and the Federal Circuit ignored the controlling legal standard, incredibly finding instead that the government had met its burden of showing that its actions were "clearly reasonable."

The Federal Circuit reached this anomalous finding by reasoning that the U.S. Court of International Trade's finding (twice) that Commerce's actions were not reasonable did not mean exactly what it stated, but instead, when it said that Commerce's methodology was "unreasonable," it "was using a shorthand word for unsupported by substantial evidence in the record." Slip Opinion, p.7. Thus, the Federal Circuit reasoned, it was appropriate to review the case anew through the EAJA "prism," and it ultimately concluded that Commerce's position was substantially justified.

Pisoni respectfully submits that the Federal Circuit's construction is not in accordance with the plain meaning of the statute, and it contravenes the clear expressions of the legislative will. Indeed, Congress has indicated that the

EAJA is not to be given an "overly technical construction . . . resulting in the unwarranted denial of fees." H.R. Rep. No. 99-120, 99th Cong., 1st Sess. 18 n.26, reprinted in 1985 U.S. Code Cong. & Admin. News 132, 146 n. 26. Moreover, Congress expressly rejected an amendment which would have changed the language governing the award of fees from "substantially justified" to "reasonably justified." See Spencer v. NLRB, 712 F.2d 539 (D.C. Cir. 1983). Thus, many courts have read this refusal as an indication that the "substantial justification standard" is a test slightly more stringent than one of reasonableness. Id. Cf. 69 A.L.R. Fed. 130, 136 "What Constitutes Substantial Justification of Government's Position so as to Prohibit Awards of Attorney's Fees Against Government Under Equal Access to Justice Act" (1984).

Notwithstanding this considerable precedent imposing a heavier burden on the government, the Federal Circuit literally ignored the factfinder's express conclusions that the government's actions were unreasonable, instead finding that Commerce's actions were "reasonable," despite two express findings that they were unreasonable. The Federal Circuit's application of the controlling law places an unreasonable burden on an applicant for fees under the act.

The Federal Circuit's decision in this case conflicts with the D.C. Circuit's decision in Federal Election Commission v. Rose, 806 F.2d 1081 (D.C. Cir. 1986). There, fully recognizing the "apparent anomaly" in this result, Rose, at 1087, the D.C. Circuit held that a finding on the merits phase that the Government's underlying action was "arbitrary and

capricious" does not compel an award of fees because such a finding merely states a "legal conclusion" which may or may not denote unreasonableness, and which warranted an "independent evaluation through an EAJA perspective." Id.

By contrast, in this case, the finding on the merits was an express factual finding that Commerce acted unreasonably. Despite the Federal Circuit's attempts to equate this finding with a finding of arbitrariness or capriciousness as in Rose, this factual finding would not warrant an independent evaluation under the analysis in Rose. To allow an agency to argue that its behavior was reasonable despite an express finding that it was unreasonable "would be to encourage government counsel to offer post hoc rationalization, or permit the courts to search for explanations not given by the agency, in order to

avoid fees under the EAJA." Id. Cf. Bonanza Trucking Corp. v. United States, Slip Opinion 87-70 (CIT June 18, 1987) (Court expressed a similar concern regarding ex post facto determinations). Thus, here, the Federal Circuit's decision conflicts with Rose, because Rose clearly did not authorize ignoring an express finding of fact, rather than merely a generalized legal conclusion, as was the case in Rose.

Finally, it is clear that Commerce has not met its burden of proving that its actions were reasonable, even if an independent analysis was warranted. Commerce compared different groups of merchandise without making necessary adjustments for differences in the merchandise. This methodology, on its face, was unreasonable, as the Court on the merits stated. It did not make sense to

compare pads that were not identical. Further, in making its exchange rate calculations, Commerce acted unreasonably. The court's conclusion that Commerce acted unreasonably in regard to the method used to calculate the exchange rates was warranted, especially since Commerce ignored the existing requirements for making these calculations, as set forth in Melamine Chemicals, Inc. v. United States, 732 F.2d 924 (Fed. Cir. 1984).

The Federal Circuit's review was virtually meaningless, and contrary to established law, because it upheld an unreasonable methodology where there was a specific factual finding that the methodology was unreasonable. Permitting this kind of post hoc rationalization is contrary to the EAJA's intent to encourage bona fide actions against the U.S. government.

Conclusion

For the foregoing reasons, this Court should grant a writ of certiorari to the U.S. Court of Appeals for the Federal Circuit.

Respectfully submitted,

Larry Klayman, Esq.
Michael C. Diedring, Esq.
KLAYMAN & GURLEY, P.C.
529 14th Street, N.W.
Suite 979
Washington, D.C. 20045
Tel: (202) 662-7450

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

87-1344

Luciano Pisoni Fabbrica
Accessori Instrumenti Musicali
and Enzo Pizzi, Inc.,
Plaintiffs-Appellants,

v.

The United States,
Defendant-Appellee.

DECIDED: January 20, 1988

Before NIES, BISSELL, and MAYER, Circuit Judges.
MAYER, Circuit Judge.

OPINION

This appeal is from an order of the United States Court of International Trade denying an application for attorney fees and other expenses under the Equal Access to Justice Act because the position of the United States was substantially justified. We affirm.

Background

On September 12, 1984, the Department of Commerce (Commerce) issued an antidumping order on pads for woodwind instrument keys from Italy. 49 Fed. Reg. 37,137. Appellants, Luciano Pisoni Fabbrica Accessori Instrumenti Musicali and Enzo Pizzi, Inc. (collectively Pisoni), are respectively the Italian producer and American importer of these pads. In the Court of International Trade, they contested the final determinations of Commerce and the International Trade Commission which provided the bases for the antidumping order.

The court upheld Commerce's decision to initiate and continue the antidumping investigation, but it determined "that Commerce's comparison of pads without allowing for differences in the physical characteristics of the different ranges of

pad sizes was unreasonable and not in accordance with law." It remanded for a merchandise adjustment under 19 C.F.R. §353.16. Luciano Pisoni Fabbrica Accessori v. United States, 640 F.Supp. 255, 260 (CIT 1986). The court also determined that Commerce should have used daily exchange rates in its currency conversion methodology, saying, "It is not reasonable for Commerce to find dumping by a firm with only ten relevant home market sales during the period of the investigation solely because of Commerce's use of quarterly exchange rates." Id.

On remand, after making the merchandise adjustment and applying daily exchange rates, Commerce concluded that the dumping margin was de minimis and that the pads were not being sold at less than fair value in the United States. The court affirmed and dismissed the case, Luciano

Pisoni Fabbrica Accessori v. United States, 645 F.Supp. 956, 957 (CIT 1986), and Commerce revoked the part of the antidumping order which applied to appellants' pads. 51 Fed. Reg. 40,239.

Pisoni then applied for attorney fees and expenses under the Equal Access to Justice Act (EAJA), 28 U.S.C. §2412(d)(1)(A). The court declined to award them because it found that the government's actions were substantially justified. Luciano Pisoni Fabbrica Accessori v. United States, 658 F. Supp. 902, 907 (CIT 1987). Here on appeal, Pisoni contends it should have the award under the EAJA because Commerce's merchandise comparison and exchange rate conversion methodologies were determined by the Court of International Trade to be unreasonable and could not therefore be considered substantially justified.

Discussion

Under the EAJA "a court shall award to a prevailing party other than the United States fees and other expenses. . .incurred by that party in any civil action. . . brought by or against the United States . . .unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust." 28 U.S.C. §2412(d)(1)(A). This court has defined "substantially justified" to require "that the Government show that it was clearly reasonable in asserting its position, including its position at the agency level, in view of the law and the facts." Gavette v. Office of Personnel Management, 808 F.2d 1456, 1467 (Fed. Cir. 1986) (in banc).

Because the Court of International Trade concluded Commerce's methodology for

comparing the pads was "unreasonable," and instructed the department to use a different currency conversion method, Pisoni argues that the actions cannot be considered "clearly reasonable" for purposes of the EAJA. In Pisoni's view, if the government's position is unreasonable on the merits, it is unreasonable period, and the court should order the government to pay its attorneys.

This view ignores the differences between the trial court's inquiries on the merits and on the fee application. The first inquiry led to a legal conclusion derived from statutory standards; the other to a factual one. In reviewing an antidumping proceeding, the Court of International Trade will "hold unlawful any determination, finding, or conclusion found. . .to be unsupported by substantial evidence on the record, or otherwise not

in accordance with law." 19 U.S.C. §1516a(b)(1). When the court said Commerce's merchandise comparison methodology was "unreasonable," it was using a shorthand word for unsupported by substantial evidence on the record. See F.T.C. v. Brown & Williamson Tobacco Corp., 778 F.2d 35, 44 (D.C. Cir. 1985); SSIH Equip. S.A. v. United States Int'l Trade Comm'n, 718 F.2d 365, 381, 218 USPQ 678, 691 (Fed. Cir. 1983) (Nies, J., additional views) ("supported by substantial evidence" raises the question: Is a finding of fact "unreasonable"?); cf. Universal Camera Corp. v. NLRB, 340 U.S. 474, 490 (1951); Fischer & Porter Co. v. United States Int'l Trade Comm'n, 831 F.2d 1574, 1577, 4 USPQ2d 1700, 1701 (Fed. Cir. 1987). Similarly, its conclusion that a dumping determination based solely on the use of quarterly exchange rates was "not reasonable" means

unsupported by substantial evidence or otherwise not in accordance with law. We say this because the court decided the case in accordance with that statutory formula, regardless of the words chosen to announce its conclusion.

Notwithstanding that in this court substantial justification under the EAJA requires that the government's position be "clearly reasonable," a conclusion on the underlying merits that its actions were unreasonable because unsupported by substantial evidence or not in accordance with law as contemplated by section 1516a(b)(1) is not the end of the inquiry. "[T]he EAJA was not intended to be an automatic fee-shifting device in cases where the petitioner prevails. . . [S]ubstantial justification is to be decided case-by-case on the basis of the record." Gavette, 808 F.2d at 1467. "The

mere fact that the United States lost the case does not show that its position in defending the case was not substantially justified." Broad Ave. Laundry & Tailoring v. United States, 693 F.2d 1387, 1391 (Fed. Cir. 1982). The decision on an award of attorney fees is a judgment independent of the result on the merits, and is reached by examination of the government's position and conduct through the EAJA "prism," see Federal Election Comm'n v. Rose, 806 F.2d 1081, 1090 (D.C. Cir. 1986), not by redundantly applying whatever substantive rules governed the underlying case.

But Pisoni cites a congressional statement which says, "Agency action found to be arbitrary and capricious or unsupported by substantial evidence is virtually certain not to have been substantially justified under the [EAJA]." H.R. Rep. No. 120, 99th Cong., 1st Sess. 9

(Pt. I 1985), reprinted in 1985 U.S. Code Cong. & Ad. News 132, 138. We agree with the D.C. Circuit that this is "spurious legislative history, as evidenced by renunciations of this precise statement in both Houses." Rose, 806 F.2d at 1090. This language does not prevent the denial of attorney fees and expenses where the underlying agency action is found to be unsupported by substantial evidence or otherwise not in accordance with law. Those are legal conclusions pursuant to separate substantive standards, which may cover a range of egregiousness, and would be reviewed as such. Under the EAJA, we review the trial court's finding that the government's position was substantially justified under the clearly erroneous standard because that is a factual decision. Essex Electro Engineers, Inc. v. United States, 757 F.2d 247, 253 (Fed. Cir.

1985); Alger v. United States, 741 F.2d 391, 394 (Fed. Cir. 1984).

In deciding the department's merchandise comparison and exchange rate conversion activities were substantially justified, the court analyzed the government's arguments in light of the complexity, uniqueness, and newness of the issues and the availability of certain cost of production data. It came to a factual conclusion about the reasonableness of the government's position, which included an assessment that the government's legal arguments were tenable. We can overturn this only if it is clearly erroneous.

Pisoni argues that the dumping determination was not substantially justified because Commerce compared different groups of merchandise without making necessary adjustments for differences in the merchandise. This

problem arose because Pisoni did not price its pads by specific size but by the average size of pads in a particular range of sizes. The size ranges for the pads sold in Italy, moreover, did not always correspond to the ranges used for the sale of these pads in the United States. Therefore, although Commerce said it was comparing the identical pad sizes sold in Italy with those sold in the United States, as a result of Pisoni's peculiar pricing and sizing practices, identical pads were not compared.

A Commerce regulation provides, in pertinent part:

> In comparing the United States price with the selling price in the home market, . . .due allowance shall be made for differences in the physical characteristics of the merchandise in the markets being compared. In this regard, the Secretary [of Commerce] will be guided primarily by the differences in cost of production, to the extent that it is established to his satisfaction that the amount of

> any price differential is wholly or partly due to such differences, but, when appropriate, the effect of such difference upon the market value of the merchandise may also be considered.

19 C.F.R. §353.16. Commerce decided against making a merchandise adjustment and provided this rationale:

> Although we considered restructuring the home market size ranges and associating weighted-average prices with the new ranges based on price increments among the existing size ranges, we ultimately disregarded this alternative in favor of the more straightforward approach of simply comparing the sales price of a particular pad size in the U.S. market with the sales price of the identical pad size and model in the home market. We did not consider an attempt to restructure the home market pricing to be appropriate, since it resulted in an adjustment for what appeared to be respondent's deliberate pricing strategy in each of the markets under review.

49 Fed. Reg. 28,295, 28,298. The court disagreed, however, and held that Commerce does not have unlimited discretion in deciding whether to make merchandise

adjustments under section 353.16. 640 F. Supp. at 259. It thought "that a merchandise adjustment was required in this investigation partly because Commerce had verified cost of production data from which to make such an adjustment." 658 F. Supp. at 906.

In fact, Commerce did not have cost of production data for the relevant pads from Italy; Pisoni had only submitted it for the average pad sizes in the United States' ranges. As a result, on remand Commerce had to estimate the cost of average pad sizes in Italy in a manner that was of questionably accuracy. Id. In what it characterized as a "novel and complex matter," the court found that the merchandise adjustment was both difficult to compute and ultimately inconclusive. Commerce considered the issues in a thoughtful and thorough manner. Under the

circumstances, we see no error in the court's finding that Commerce was clearly reasonable in deciding not to make a merchandise adjustment.

Pisoni also contends that Commerce's use of quarterly instead of daily exchange rates was "skewed and improper" and violated the guidelines of Melamine Chemicals, Inc. v. United States, 732 F.2d 924 (Fed. Cir. 1984). On the merits, the court said, "It is not reasonable for Commerce to find dumping by a firm with only ten relevant home market sales during the period of the investigation solely because of Commerce's use of quarterly exchange rates." 640 F. Supp. at 260.

Commerce elected to use quarterly exchange rates pursuant to 19 C.F.R. §353.56(a). Subsection (b), an exception to subsection (a), Melamine Chemicals, 732 F.2d at 929, provides:

> Special rules for fair value investigations. For purposes of fair value investigations, manufacturers, exporters, and importers concerned will be expected to act within a reasonable period of time to take into account price differences resulting from sustained changes in prevailing exchange rates. Where prices under consideration are affected by temporary exchange rate fluctuations, no differences between the prices being compared resulting solely from such exchange rate fluctuations will be taken into account in fair value investigations. [Emphasis added.]

Subsection (b) "establishes a 'special rule' applicable only to those abnormal situations in which an artificial margin is caused solely by rapidly fluctuating, temporary exchange rates." Melamine Chemicals, 732 F.2d at 929.

Commerce considered the applicability of this subsection and Melamine Chemicals and decided they did not control the problem presented. In distinguishing subsection (b), it reasoned that (1) the exchange rate fluctuation reduced rather than created

less than fair value margins; (2) the exchange rate declined in a constant and nonvolatile fashion which could not be considered a temporary fluctuation as contemplated by this subsection; and (3) the exporter failed to act within a reasonable time to take into account the differences in price resulting from the sustained changes in the prevailing rates. 49 Fed. Reg. 28,297; see 685 F. Supp. at 906.

Commerce also distinguished Melamine Chemicals, the only case involving a currency conversion question, by noting:

> Regarding the appeals court decision on melamine from the Netherlands, it is abundantly clear that the court was concerned with temporary and volatile exchange rate fluctuations occurring during the period of investigation that created margins which would not have otherwise existed. Under these conditions, the court approved the use of exchange rates in effect during an earlier more stable period. The exchange rates behavior in our present investigation differs markedly from

> that in melamine and, as stated earlier, tends to reduce rather than create margins.

49 Fed. Reg. at 28,298 (emphasis added).

The court recognized this as a transaction in an "evolving area of the antidumping laws" and that Commerce "might have grounds" for distinguishing this situation from 19 C.F.R. §353.56(b) and Melamine Chemicals. 658 F. Supp. at 907. Commerce carefully considered the issues here and provided reasonable explanations for its approach. The correctness of its position on the merits is not before us, and we intimate no view on that. But even though the decision went against the government, the trial court concluded it did not persist in pressing a tenuous factual or legal position. Gavette, 808 F.2d at 1467. Apart from Pisoni's attempted equation of the government's loss on the merits with its entitlement to fees

and expenses, nothing was argued to us that would suggest the court was wrong in this assessment.

Conclusion

Accordingly, the Court of International Trade's denial of Pisoni's application for attorney fees and expenses under the EAJA is

AFFIRMED.

APPENDIX B

SLIP OP. 87-48

UNITED STATES COURT OF INTERNATIONAL TRADE

LUCIANO PISONI FABBRICA ACCESSORI INSTRUMENTI MUSICALI, AND ENZO PIZZI, INC.,	)
Plaintiff,	)
v.	)
UNITED STATES,	)
Defendant.	)

Plaintiffs seek an award of attorney's fees and expenses under the Equal Access to Justice Act (EAJA), asserting that the position of Commerce in reaching the final affirmative determination leading to issuance of an antidumping duty order on pads for woodwind instrument keys from Italy was not substantially justified.

Held: Under the standard governing EAJA awards the position taken by Commerce in

reaching the final affirmative determination was substantially justified. [The application for attorney's fees and expenses is denied.]

Decided: April 9, 1987

Klayman & Gurley, P.C. (Larry Klayman and John Gurley) for plaintiffs.

Richard K. Willard, Assistant Attorney General, David M. Cohen, Director, Commercial Litigation Branch, Civil Division, Department of Justice (Elizabeth Seastrum; Edward Madaj, International Trade Commission, of counsel) for defendant.

Memorandum Opinion and Order

DiCARLO, Judge: Plaintiffs, Luciano Pisoni Fabbrica Accessori Instrumenti Musicali and Enzo Pizzi, Inc. seek attorney's fees and other expenses incurred in their action challenging an antidumping duty order on pads for woodwind instrument keys from Italy. Plaintiffs make their application for such fees and expenses under the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412(d)(1)(A) (1982 &

Supp. III 1985) pursuant to Rule 68 of the rules of this Court. The Court denies plaintiffs' application, holding that under the standard governing EAJA awards the position of Commerce in reaching the final affirmative determination leading to issuance of the antidumping duty order was substantially justified.

Background

On September 12, 1984, the United States Department of Commerce, International Trade Administration (Commerce) published the antidumping duty order challenged by plaintiffs. See Pads for Woodwind Instrument Keys From Italy; Antidumping Duty Order, 49 Fed. Reg. 37,137 (1984). Plaintiffs timely filed their complaint, contesting the final determinations by Commerce and the United States International Trade Commission (Commission) underlying the antidumping duty order.

Commerce had issued an affirmative final determination pursuant to section 735(a) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1673d(a) that pads for woodwind instrument keys from Italy were being sold in the United States at less than fair value. Pads for Woodwind Instrument Keys From Italy; Final Determination of Sales at Less Than Fair Value, 49 Fed. Reg. 28,295 (1984). The Commission had issued a final affirmative injury determination pursuant to section 1673d(b) that the United States industry was materially injured by reason of imports of these pads. Pads for Woodwind Instrument Keys from Italy, Inv. No. 731-TA-152 (Final), USITC Pub. 1566, 49 Fed. Reg. 34,313 (1984).

Plaintiffs filed a motion for judgment upon the agency record pursuant to Rule 56.1 of the Rules of this Court, challenging both the Commerce and

Commission determinations. With regard to Commerce, plaintiffs contested (1) the initiation of the antidumping investigation; (2) the continuation of the antidumping investigation; (3) the method of comparing the prices of pads from varying size ranges; and (4) the methodology employed for currency conversion. With regard to the Commission, plaintiffs argued that it improperly disregarded the size of the margin in its material injury determination.

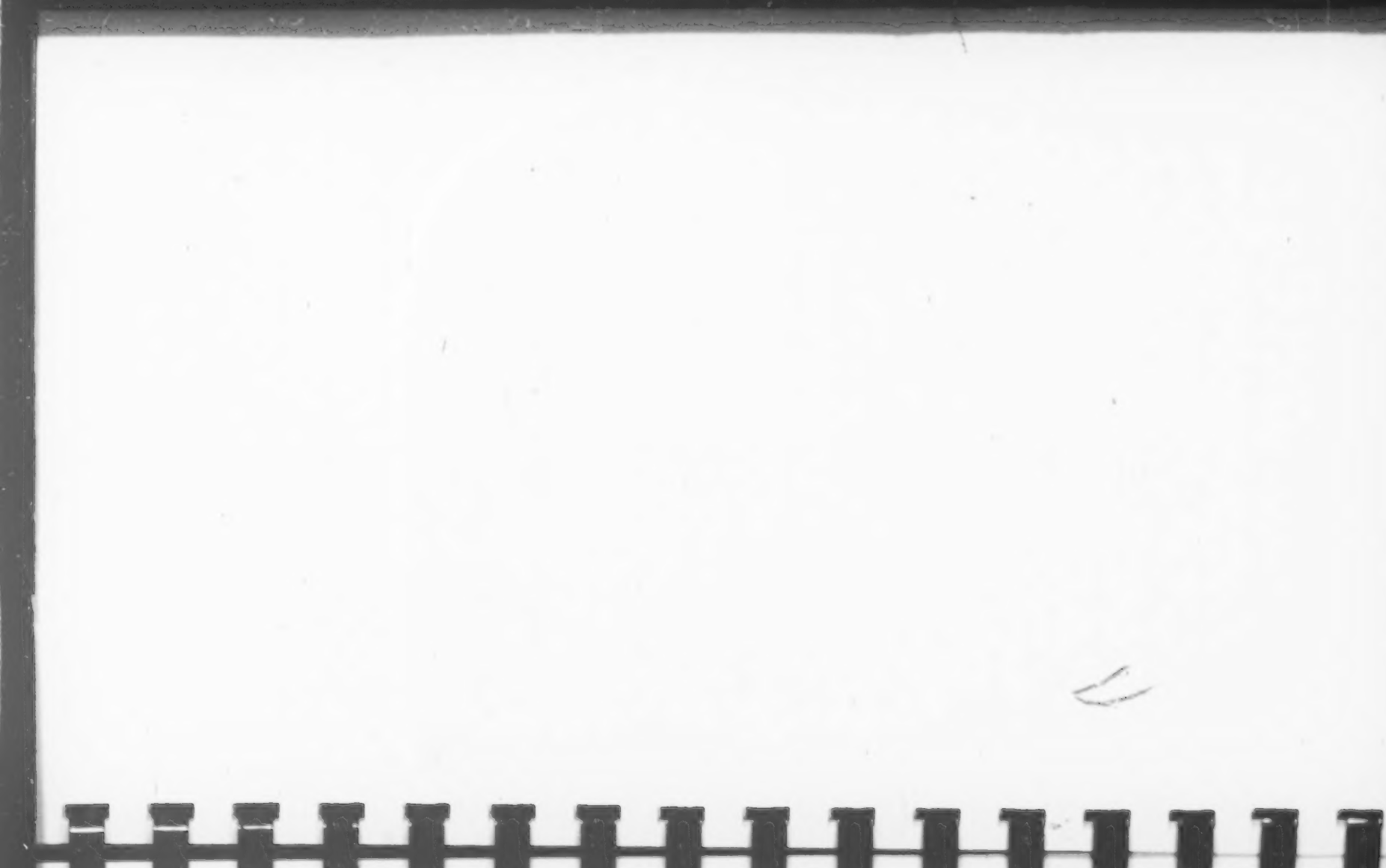
Shortly after oral argument, at the Court's request, Commerce submitted recalculations showing that the use of daily exchange rates for currency conversions rather than quarterly rates would not in and of itself have resulted in a negative determination. Plaintiffs moved to strike these recalculations.

On June 12, 1986, the Court issued an opinion remanding the action to Commerce. See Luciano Pisoni Fabbrica Accessori Instrumenti Musicali v. United States, 10 CIT ____, 640 F. Supp. 255 (1986). In that opinion, the Court sustained Commerce's decision to initiate and to continue the investigation. The Court further held that a merchandise adjustment pursuant to 19 C.F.R. § 353.16 was required to allow for differences in the physical characteristics of the different ranges of pads compared for pricing purposes and that Commerce had to use daily exchange rates rather than quarterly exchange rates in making currency conversions for this investigation. The Court also denied plaintiff's motion to strike the recalculations as moot, because plaintiffs could make necessary comments to the remand results. The Court declined to decide the

issue involving the Commission, since upon remand the margin might be eliminated.

On remand Commerce made a merchandise adjustment under 19 C.F.R. § 353.16 and used daily exchange rates for all lira/dollar conversions. Based on new calculations, Commerce found the weighted-average dumping margin to be de minimis and concluded that the merchandise was not being sold in the United States at less than fair value.

In an opinion and order issued on September 15, 1986, the Court affirmed the remand results of Commerce and dismissed the action. Luciano Pisoni Fabbrica Accessori Instrumenti Musicali v. United States, 10 CIT ___, 645 F. Supp. 956 (1986). Commerce then issued a notice of partial revocation of the antidumping duty order, resulting in a revocation of that order with respect to plaintiffs. See Pads



for Woodwind Instrument Keys from Italy; Partial Revocation of Antidumping Duty Order, 51 Fed. Reg. 40,239 (1986).

Plaintiffs filed an application for attorney's fees and expenses on October 15, 1986. The Court accepted an amendment to this application filed December 4, 1986 during a phone conference involving all parties held on December 10, 1986. Defendant responded to both the original and amended application.

Opinion

The Court first must address defendant's contention that plaintiffs are not entitled to attorney's fees and expenses under the EAJA because the original application submitted by plaintiffs on October 15th was statutorily deficient. Defendant stresses that the original application lacked both the itemized statement, required by 28 U.S.C. §

2412(d)(1)(B), and the information necessary for a proper determination of plaintiff's eligibility under 28 U.S.C. § 2412(d)(2)(B).

The Court agrees that the application as originally filed on October 15th was deficient in the information necessary for a proper application under the EAJA. The Court need not determine in this action whether the failure to strictly comply with the statutory requirements results in the untimely submission of an EAJA application, because plaintiffs' amended application was also timely filed.

The EAJA statute provides that a party has 30 days from the date of entry of a final judgment to file an application, defining "final judgment" as "a judgment that is final and not appealable . . . ." 28 U.S.C. § 2412(d)(1)(B) and (d)(1)(C)(2)(G). An appeal to the Federal

Circuit from a judgment entered by the Court of International Trade when the United States is a party must be filed within 60 days of entry of the judgment. Fed. Cir. R. 10(a)(1); Fed. R. App. P. 4(a). Plaintiffs thus had 90 days from the entry of the September 15th judgment entered by this Court in which to file a proper application under the EAJA requirements. See, e.g., Gavette v. Office of Personnel Management, 808 F.2d 1456, 1459 (Fed. Cir. 1986) (finding time for filing petition for certiorari did not expire until 90 days after entry of judgment giving applicant a total of 120 days from entry of judgment in which to file EAJA application for fees and expenses).

Pursuant to the discretion afforded to it by part (c) of Rule 68, the Court accepted the supplemental information filed by

plaintiffs on December 4th as an amendment to the original application. As timely amended within the 90 day limit, plaintiff's application contains the itemized statement required by 28 U.S.C. § 2412(d)(1)(B), and based upon other amendment information defendant concedes that plaintiffs meet the eligibility criteria of the EAJA for purposes of 28 U.S.C. § 2412(d)(2)(B).

Having found that plaintiffs have submitted a valid application, the Court must determine if this is a proper case for an award of attorney's fees and other expenses under the EAJA. The relevant section of the EAJA provides that the court "shall" award fees and expenses unless "the position of the United States was substantially justified or that special circumstances make an award unjust." 28 U.S.C. § 2412(d)(1)(A).

In the recent Gavette decision, our appellate Court discussed the standard for evaluating an EAJA claim, stating:

> We hold that "substantial justification" requires that the Government show that it was clearly reasonable in asserting its position, including its position at the agency level, in view of the law and the facts. The Government must show that it has not "persisted in pressing a tenuous factual or legal position, albeit one not wholly without foundation." It is not sufficient for the Government to show merely "the existence of a colorable legal basis for the government's case." (Emphasis in original) (footnotes omitted).

Gavette, 808 F.2d at 1467.

Plaintiffs assert that the position of the United States was not substantially justified, arguing that in reaching the final determination Commerce did not make the required adjustments for differences in the merchandise or adopt a proper method for currency conversion. To support their claim, plaintiffs quote from the Court's opinion of June 12, 1986 where the Court

held that the actions taken by Commerce were unreasonable and not in accordance with law. Plaintiffs suggest that Commerce cannot be clearly reasonable in the position it took when the Court has determined that such action was unreasonable.

In the earlier opinion on the merits, the Court applied the substantial standard for review of agency determinations provided in 19 U.S.C. § 1516a(b)(1)(B) (1982). Under a substantial evidence standard, the Court must accept Commerce's findings if they are supported by "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Federal Trade Commission v. Indiana Federation of Dentists, 106 S.Ct. 2009, 2015 (1986). The Court will reverse action taken by Commerce, therefore, if such action is determined by the Court to be unreasonable.

Plaintiff's argument suggests that the Court of International Trade must award attorney's fees and expenses under the EAJA to all qualified applicants who successfully challenge agency action governed by the substantial evidence standard of review. The EAJA supplies the legal standard of substantial justification, however, which is a distinct standard of review apart from whatever standard is applicable to the underlying decision on the merits. By providing a separate legal standard Congress sought to avoid automatic fee-shifting in favor of a case-by-case analysis on the basis of the record. See Gavette, 808 F.2d at 1467. In light of this separate standard of review, the Court concludes that Congress intended that an analysis under an EAJA perspective be independent from the decision on the merits. See Federal Election Comm'n v.

Rose, 806 F.2d 1081, 1086-90 (D.C. Cir. 1986).

An independent analysis employing EAJA principles can result in a finding that the position of the United States at the litigation stage and the agency level was substantially justified despite a finding on the merits that the agency action must be reversed because it was unreasonable. The Court is not persuaded that the remark in the House Report, H.R. Rep. No. 120, 99th Cong., 1st Sess. 9-10 (Pt. I 1985), reprinted in 1985 U.S. Code Cong. & Ad. News 132, 138, that "[a]gency action found to be arbitrary and capricious or unsupported by substantial evidence is virtually certain not to have been justified under the Act" prevents such result. The Rose Court found this statement to be an unsupported, offhand generalization which does not prevent

independent analysis resulting in a denial of attorney's fees and expenses even where the underlying agency action is found on the merits to be arbitrary and capricious. 806 F.2d at 1089-90.

It is consistent with the intent of the EAJA and its legislative history for a court to conclude that the action taken by the agency at the time was clearly reasonable even though such action is later found to be unreasonable after having run the gamut of the legal process. This is especially true in antidumping and countervailing duty investigations where Commerce and the Commission often must make novel interpretations based upon facts unique to the particular industry at the relevant time.

As discussed in the earlier opinion, the issue concerning a need for a merchandise adjustment arose because plaintiffs' pads

were priced by size range rather than the assignment of a set price to each particular pad size. Plaintiffs used ranges for the pads sold in Italy which did not always correspond to the ranges it used for pad sold in the United States. As a result, Commerce's comparison of the sales price for a particular pad size sold in one market could lead to the pairing of prices from disparate size ranges.

Commerce chose not to make a merchandise adjustment to compensate for this possible disparity. Commerce exercised the discretion afforded it under regulation 19 C.F.R. § 353.16 in not making a merchandise adjustment, contending that this was a deliberate pricing strategy in the markets under review that did not warrant a restructuring of the home market pricing. Evaluating the alternative pricing method offered by plaintiffs, Commerce stated that

"[a]lthough we considered restructuring the home market size ranges and associating weighted-average prices with the new range based on price increments among the existing size ranges, we ultimately disregarded this alternative in favor of the more straightforward approach of simply comparing the sales price of a particular pad size in the U.S. market with the sales price of the identical pad size and model in the home market." 49 Fed. Reg. at 28,198.

In its opinion, the Court found that Commerce did not have unlimited discretion in deciding whether to make adjustments under regulation 353.16. The Court was persuaded that a merchandise adjustment was required in this investigation partly because Commerce had verified cost of production data from which to make such adjustment.

On remand, however, Commerce stated that it did not have cost of production data on record for the Italian home market pad size ranges. Plaintiffs had supplied such information pertaining only to average pad sizes in the United States ranges. Commerce thus estimated costs of average pad sizes in the Italian market by averaging the averages of the United States average pad sizes immediately above and below the average home market pad size on a proportionate basis with each different material component. These estimates resulted in an artificial adjustment for differences in the pad pricing that cannot be totally verified.

The Court maintained that Commerce was required to make this merchandise adjustment. In light of the difficulty and inconclusiveness of the remand results, the Court finds that Commerce's decision not

to make a merchandise adjustment in reaching a final affirmative determination was clearly reasonable in light of the law, regulations and facts as they existed at the time. Commerce in this novel and complex matter has not "persisted in pressing a tenuous factual or legal position." Gavette, 808 F.2d at 1467.

A similar analysis under EAJA principles applies to the currency conversion issue. Pursuant to regulation 19 C.F.R. § 353.56, Commerce elected to use quarterly conversion rates rather than daily rates. Commerce considered whether the special provision of the regulation was applicable, which states:

> (b) Special rules for fair value investigations. For purposes of fair value investigations, manufacturers, exporters, and importers concerned will be expected to act within a reasonable period of time to take into account price differences resulting from sustained changes in prevailing exchange rates. Where prices under

> consideration are affected by temporary exchange rate fluctuations, no differences between the prices being compared resulting solely from such exchange rate fluctuations will be taken into account in fair value investigations.

19 C.F.R. § 353.56(b).

Commerce distinguished plaintiffs situation reasoning that (1) the movement of the exchange rate during the period of investigation served to reduce margins of less than fair value rather than to create margins; (2) the steady movement of the exchange rate did not constitute the temporary fluctuations envisioned by the regulation, showing instead a constant, non-volatile progression downward; and (3) the exporter did not act within a reasonable period of time to take into account the price differences resulting from sustained changes in the prevailing rates. 49 Fed. Reg. at 28,297.

Commerce set forth reasons why it distinguished the only applicable judicial decision, Melamine Chemicals, Inc. v. United States, 2 Fed. Cir. 57, 732 F.2d 924 (1984):

> Regarding the appeals court decision on melamine from the Netherlands, it is abundantly clear that the court was concerned with temporary and volatile exchange fluctuations occurring during the period of investigation that created margins which would not have otherwise existed. Under these conditions, the court approved the use of exchange rates in effect during an earlier more stable period. The exchange rate behaviour in our present investigation differs markedly from that in melamine and, as stated earlier, tends to reduce rather than create margins.

49 Fed. Reg. at 28,298.

In reaching its opinion of June 12, 1986, the Court recognized that Commerce might have grounds for distinguishing plaintiffs' situation from regulation 353.56(b) and the Melamine decision. The Court was concerned, on the other hand, that in this

particular situation, where only ten home market sales were involved, the failure to use daily rates could in combination with the failure to make a merchandise adjustment lead to a result that violated the purpose of the antidumping laws. The Court found it would not be reasonable for Commerce to find a dumping margin in this situation "solely" because of the use of quarterly exchange rates and remanded the action.

Commerce may not have been aware that the use of quarterly rates rather than daily rates could cause such an incongruous result, since the recalculations made at the Court's requests following oral argument indicated that without a merchandise adjustment a dumping margin would still exist using daily exchange rates. At the time Commerce made its choice to use quarterly rates, the Court

finds that it was clearly reasonable to distinguish the facts as presented by plaintiffs from those necessary for invoking regulation 353.56(b). The Court is persuaded that in this evolving area of the antidumping laws Commerce did not persist in pressing a tenuous factual or legal position.

Conclusion

The Court holds that under the standard governing EAJA awards the action taken by Commerce in reaching the final affirmative determination was substantially justified. Plaintiffs' application for attorney's fees and expenses is denied.

So ordered.

DOMINICK L. DiCARLO

JUDGE

Dated: New York, New York

May 17, 1987

APPENDIX C

LUCIANO PISONI FABBRICA ACCESSORI INSTRUMENTI MUSICALI,
and Enzo Pizzi, Inc., Plaintiffs,

v.

UNITED STATES, Defendant.

Court No. 84-10-01435.

United States Court of International Trade.

September 15, 1986.

Klayman & Gurley, P.C. (Larry Klayman and John Gurley), Washington, D.C., for plaintiffs.

Richard K. Willard, Asst, Atty. Gen., David m. Cohen, Director, Commercial Litigation Branch, Civil Div., Dept. of Justice (Elizabeth Seastrum, Edwin Madaj, Intern. Trade Com'n, Washington, D.C., of counsel), for defendant.

Mudge, Rose, Guthrie, Alexander & Ferdon (N. David Palmeter and Jeffrey Neeley), Washington, D.C., for amicus curiae Hyundai Steel Ind. Co. Ltd.

Dewey, Ballentine, Bushby, Palmer & Wood (Alan Wm. Wolff, Jane Albrecht), and Akin, Gump, Strauss, Hauer & Feld (Richard R. Rivers), Washington, D.C., for amicus curiae Lone Star Steel Co.

MEMORANDUM OPINION AND ORDER

DiCARLO, Judge:

On June 12, 1986 the Court held that a final determination by the Department of Commerce, International Trade Administration (Commerce) that pads for woodwind instrument keys from Italy are being sold in the United States at less than fair value, was not supported by substantial evidence or in accordance with law. Luciano Pisoni Fabbrica Accessori Instrumenti Musicali, et al. v. United States, 640 F.Supp. 255, 10 CIT - (1986). Commerce's final determination had resulted in an order assessing an antidumping duty of 1.16% ad valorem.

The Court held that Commerce had improperly compared different merchandise in determining the difference between United States price and home market price. The action was remanded to Commerce with instructions to make an adjustment for differences in the physical characteristics

of the merchandise under 19 C.F.R. § 353.16 (1985).

The Court also held that in an investigation involving only ten home market sales, Commerce may not reasonably find a dumping margin by using quarterly exchange rates when no dumping margin would result if conversions were based on rates prevailing at the time of the transactions.

In accordance with the Court's instructions, Commerce made a merchandise adjustment under 19 C.F.R. § 353.16 and used daily exchange rates for all lira/dollar conversions. Commerce found a weighted-average dumping margin of .286%, which it said was de minimis, and concluded that the merchandise was being sold in the United States at not less than fair value.

Although Commerce did not give its reasons for finding the dumping margin de minimis, see Carlisle Tire & Rubber Co. v.

United States, 10 CIT ___, 634 F.Supp. 419 (1986), the parties have submitted their comments on the remand proceedings, and there are no objections to Commerce's redetermination.

Accordingly, Commerce's redetermination is affirmed and the action is dismissed.

So ordered.

APPENDIX D

LUCIANO PISONI FABBRICA ACCESSORI INSTRUMENTI MUSICALI and Enzo Pizzi, Inc., Plaintiffs,

v.

The UNITED STATES, Defendant.

No. 84-10-01435

United States Court of International Trade

June 12, 1986

Klayman & Gurley, P.C. (Larry Klayman and John Gurley), Washington, D.C., for plaintiffs.

Richard K. Willard, Asst. Atty. Gen., David M. Cohen, Director, Commercial Litigation Branch, Civil Div., Dept. of Justice (Elizabeth Seastrum; Edwin Madaj, Intern. Trade Com'n, Washington, D.C., for amicus curiae Hyundai Steel Ind. Co., Ltd.,

Dewey, Ballentine, Bushby, Palmer & Wood, (Alan Wm. Wolff, Jane Albrecht) and Akin, Gump, Strauss, Hauer & Feld, (Richard R. Rivers) Washington, D.C. for amicus curiae Lone Star Steel Co.

Memorandum Opinion and Order

DiCARLO, Judge:

Plaintiffs, an Italian producer of woodwind instrument pads and its United States importer, challenge final

affirmative determinations of the United States Department of Commerce, International Trade Administration (Commerce), Pads for Woodwind Instrument Keys From Italy; Final Determination of Sales at Less Than Fair Value, 49 Fed.Reg. 28295 (1984), and the International Trade Commission (Commission), Pads for Woodwind Instrument Keys from Italy, Inv. No. 731-TA-152 (Final), USITC Pub. 1566 (1984), 49 Fed.Reg. 34313 (1984), that resulted in an order assessing an antidumping duty of 1.16% ad valorem on woodwind instrument pads from Italy. 49 Fed.Reg. 37137 (1984).

Plaintiffs make four arguments challenging Commerce's determination that woodwind instrument pads are being sold in the United States at less than fair value. Since the Court holds that Commerce unreasonably failed to make a merchandise adjustment under 19 C.F.R. §353.16, and

that a dumping margin may not be found to exist as a result of currency changes, the dumping margin may be eliminated following remand. Therefore the Court does not address plaintiffs' contention that the Commission improperly disregarded the size of the margin in its material injury determination.

I. Judicial Review

In reviewing an antidumping duty determination by Commerce, the standard of review is not de novo. Rather, the Court must hold unlawful any determination, finding, or conclusion found "to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. §1516a(b)(1)(B) (1982). Under the substantial evidence standard for review of agency determinations, the Court must accept Commerce's findings if they are supported by "such relevant evidence as a

reasonable mind might accept as adequate to support a conclusion." Federal Trade Commission v. Indiana Federation of Dentists, ___ U.S. ___, ___, 106 S.Ct. 2009, 2014, 90 L.Ed.2d 445 (U.S. 1986). Substantial deference is granted to the agency in both its interpretation of its statutory mandate and the methods it employs in administering the antidumping law. See American Lamb Co. v. United States, 785 F.2d 994 (Fed.Cir. 1986); Carlisle Tire & Rubber Co. v. United States, 9 CIT ___, 622 F.Supp. 1071 (1985).

II. Commerce's Determination of Sales at Less than Fair Value

A. Commerce's Initiation of the Investigation

[1] Plaintiffs allege that the antidumping petition did not contain required price information and therefore should have been rejected by Commerce.

A petition must contain "information reasonably available to the petitioner supporting the allegations" of the "elements necessary for the imposition" of antidumping duties. 19 U.S.C. §1673a(b)(1), (c)(1). A Commerce regulation, 19 C.F.R. §353.36(a)(7), says that petitions "shall contain":

> All pertinent facts as to the price at which the foreign merchandise is sold or offered for sale in the United States and in the home market in which produced or from which exported. . . and if appropriate, information regarding sales in third countries or the cost of producing the merchandise. Petitioners unable to furnish information on foreign sales or costs may present information concerning U.S. domestic producers' costs adjusted for differences in the foreign country in question from information publicly available.

The petition contained: (1) home market (Italian) price lists for plaintiffs' pads, in dollars, dated January 1, 1982; (2) export price lists for petitioner's pads, in lira, dated December 1, 1982; (3)

estimated home market cost of production data based on petitioner's actual 1976 costs when it manufactured in Italy; and (4) petitioner's cost of production data, current to September, 1983.

Plaintiffs say the price lists were not a sufficient basis to initiate the investigation because they were "out-of-date, not in effect, and clearly inapplicable to the U.S. and Italian markets as alleged." Plaintiffs' Reply Brief at 6. Plaintiffs contend that the fact that the Italian prices were listed in dollars and the United States prices were listed in lira particularly rendered the price lists an insufficient basis to initiate the investigation.

Commerce says that although the price lists submitted by the petitioner were suspect (Commerce later determined the price lists were mislabeled), they provided

an adequate basis to proceed since prices on both lists were less than petitioner's cost of production. Commerce also argues it was reasonable to initiate an investigation on the basis of a comparison of price lists allegedly from 1982 with petitioner's 1983 cost of production data.

[2] Commerce interprets the statutory requirement that the petition contain only information "reasonably available to the petitioner" as permitting Commerce to accept petitions from small businesses with less information than would be acceptable in petitions from large businesses. The Court finds this interpretation consistent with the intent of Congress. See S.Rep. No. 96-249, 96th Cong., 1st Sess. 47, reprinted in 1979 U.S. Code Cong. & Ad. News 433.

[3, 4] Also, Commerce has some discretion in deciding whether to initiate

an investigation; Commerce is permitted to assess the sufficiency of the petition "in light of its own knowledge and expertise" and facts capable of judicial notice. United States v. Roses, Inc., 1 Fed.Cir. 39, 46, 706 F.2d 1563, 1568-69 (1983). However, Commerce may not, as plaintiffs argue, accept a letter from plaintiffs' counsel arguing against initiating the investigation. Roses prohibits Commerce from considering such communications during the 20-day period Commerce has to decide whether to begin an investigation after the filing of the petition under 19 U.S.C. §1673a(c). Plaintiffs' suggestion that Gilmore Steel Corp. v. United States, 7 CIT 219, 585 F.Supp. 670 (1984), "limits" Roses is in error, since Gilmore does not address preinitiation communications.

The Court holds that Commerce's decision to initiate the investigation was a

"sufficiently reasonable" interpretation of the statute, American Lamb Co. v. United States, 4 Fed.Cir. ___, 785 F.2d 994, 995 (1986), and was in accordance with law.

B. Commerce's Continuation of the Investigation

[5] Plaintiffs argue that Commerce should have rescinded the notice initiating the investigation when it learned that the petitioner failed to provide accurate price information. During the investigation, Commerce determined that one of the price lists furnished by petitioner was effective from 1976 to early 1980 instead of 1982, as alleged. Plaintiffs argue that once this information was discovered there was no longer any basis to conduct the investigation, and the notice of initiation should have been rescinded.

The statutory scheme offers no basis for plaintiffs' position that Commerce is

required to rescind a notice of initiation of an investigation upon discovering inaccuracies in a petition. Once Commerce has commenced an investigation, it is obligated to "make a determination, based upon the best information available to it at the time of the determination, of whether there is a reasonable basis to believe or suspect that the merchandise is being sold, or is likely to be sold at less than fair value." 19 U.S.C. §1673b(b)(1) (1982). If the best information available, including the petition, affords no such reasonable basis, Commerce must make a negative preliminary determination of sales at less than fair value.

In making a final determination in an investigation, Commerce must verify all information on which it relies. 19 U.S.C. §1677e (1982 & Supp. II 1984). Corrections to petitioners' data are the very point of

verification procedures. It is therefore proper for Commerce to complete an investigation commenced after a petition is filed by an interested party even when a petition is found to contain inaccuracies. Since Commerce is authorized to commence an antidumping duty investigation sua sponte whenever it determines that an investigation is warranted based upon available information, 19 U.S.C. §1673a(a) (1982), it would be unreasonable to require that Commerce terminate an investigation commenced after the filing of a petition by an interested party when, despite inaccuracies contained in the petition, it finds evidence of sales at less than fair value.

Plaintiffs' reliance on Gilmore Steel Corp. v. United States, 7 CIT 219, 585 F.Supp. 670 (1984) is misplaced. In that case the domestic plaintiff challenged

Commerce's authority to terminate an investigation after initiation. Two months after issuing an affirmative preliminary determination, Commerce said that it believed plaintiff did not have standing to file a petition on behalf of a United States industry, and that the investigation should not have been initiated. The Court affirmed the power of Commerce to terminate investigations where such a fundamental defect in the petition comes to its attention after expiration of the 20-day review period. The Court did not hold, as plaintiffs claim, that Commerce has an obligation to terminate investigations if it finds inaccuracies in a petition. The Court holds that Commerce's decision not to rescind the notice of initiation was in accordance with law.

C. Commerce's Comparison of the Merchandise

[6] Plaintiffs also claim that Commerce compared different merchandise without making necessary adjustments for the differences in the merchandise.

In both Italy and the United States the price of different pads is determined by the average size of pads in particular size ranges. A Commerce investigator explained the situation as follows:

> For example, the price for a 19mm saxophone pad when sold in Italy is based on the average size pad in the 14.5-20mm range, about 17.5mm. This same pad when sold in the U.S. falls in the 17.5-22mm range and thus its price is based on the average for that range, about 20mm. On the other hand, the price for a 21mm saxophone pad in Italy is based on the average size for the 20.5-30 mm range, about 26mm, while the price in the U.S. for this pad, based on the 20mm average for its size range, would be the same as for the 19mm pad.
>
> The problem posed by this situation is that in comparing saxophone pads of the same size in these two markets, the facts that were the basis for the pricing decisions were different. In the above examples, a comparison of 19mm pads between Italy and the U.S.

> is in effect a comparison of the pricing decisions based on the costs of 17.5mm pads in Italy and 20mm pads in the U.S. A comparison of 21mm pads is a comparison of the pricing decisions based on the costs of 26mm pads in Italy and 20mm pads in the U.S.

R.Doc. 44, at 2-3.

Although Commerce said they compared the sales price of a particular pad size in the United States market with the sales price of the identical pad size in the home market, their comparison did not result, according to the investigator's report, in a comparison of identical pads sold in Italy and the United States. In its determination, Commerce said

> We did not consider an attempt to restructure the home market pricing to be appropriate, since it resulted in an adjustment for what appeared to be [plaintiffs'] deliberate pricing strategy in each of the markets under review.

49 Fed.Reg. 28,295, 28,298.

Plaintiffs say that Commerce was required to make either a circumstances of sale or a merchandise adjustment to allow for the comparison of different size pads. A circumstances of sale adjustment is not warranted, since the differences in the ranges of pad sizes in the two markets is not a "selling cost" similar to "credit terms, guarantees, warranties, technical assistance, servicing, and assumption by a seller of a purchaser's advertising. . . ." 19 C.F.R. §353.15(b). However, the Court holds that a merchandise adjustment was required.

The Commerce regulation providing for adjustments for differences in physical characteristics in the merchandise, 19 C.F.R. §353.16, provides in part:

> In comparing the United States price with the selling price in the home market, or for exportation to countries other than the United States in the case of similar merchandise,

> due allowance shall be made for differences in the physical characteristics of the merchandise in the markets being compared. In this regard, the Secretary will be guided primarily by the differences in cost of production, to the extent that it is established to his satisfaction that the amount of any price differential is wholly or partly due to such differences, but, when appropriate, the effect of such difference upon the market value of the merchandise may also be considered.

Defendant does not argue that the ranges of pad sizes compared by Commerce were the same, but claims that Commerce has unlimited discretion to grant or deny merchandise adjustments under 19 C.F.R. §353.13, which provides that any "person who alleges entitlement to any adjustment pursuant to sections 353.14 through 353.19 must establish entitlement thereto to the satisfaction of the Secretary." Defendant contends that plaintiffs failed to "establish a methodology which would permit

the ITA to quantify the amount of such an adjustment." Defendant's Brief, at 39.

Commerce's discretion in making adjustments under 19 C.F.R. §353.16 is not unlimited. Our appellate court has required that Commerce's decision whether to grant or to deny an adjustment under section 353.16 must be "reasonable." Smith-Corona Group, Consumer Products Division, SCM Corp. v. United States, 1 Fed.Cir. 130, 144-45, 713 F.2d 1568, 1582 (1983). Moreover, Commerce performed a verification of plaintiffs' cost of production, which could have provided a basis for a merchandise adjustment under section 353.16.

The Court will not instruct Commerce how to compensate for the physical differences in the compared merchandise. However, the Court holds that Commerce's comparison of pads without allowing for differences in

the physical characteristics of the different ranges of pad sizes was unreasonable and not in accordance with law.

D. Commerce's Currency Conversion Methodology

[7] Finally, plaintiffs argue that Commerce is required to adopt a reasonable method of currency conversion for its ten home market sales during the period of investigation which does not create a dumping margin.

Plaintiffs say Commerce is obligated to do this for two reasons: (1) the purpose of the antidumping laws is to remedy unfair trade, not to punish foreign producers selling for less than United States producers, and (2) a Commerce regulation requires that differences between prices caused by currency fluctuations be disregarded. The regulation provides:

> (b) Special rules for fair value investigations. For purposes of fair value investigations, manufacturers, exporters, and importers concerned will be expected to act within a reasonable period of time to take into account price differences resulting from sustained changes in prevailing exchange rates. Where prices under consideration are affected by temporary exchange rate fluctuations, no differences between the prices being compared resulting solely from such exchange rate fluctuations will be taken into account in fair value investigations. [Emphasis added].

19 C.F.R. §353.56(b). See Melamine Chemicals, Inc. v. United States, 2 Fed.Cir. ___, 732 F.2d 924 (1984).

Defendant argues that Commerce properly applied the general rule for currency conversions under §353.56(a), basing exchange rates on quarterly rates published by the Secretary of the Treasury as provided by 31 U.S.C. §5151 (1982). But in Melamine, the government argued, and the Court held, that 31 U.S.C. §5151 applies only to the assessment and collection of

duties, not to less than fair value investigations. 31 U.S.C. §5151 does not compel Commerce to use quarterly rates.

Defendant says use of some other currency conversion method was not required under section 353.56(b) since the value of the lira compared to the dollar did not "fluctuate" during the period under investigation, but rather declined steadily, which should have served to reduce rather than create a margin. Plaintiffs agree that the depreciation of the lira would effectively decrease any margin, but argue that they were not permitted to reap the benefit of the lira's decline since Commerce based its conversion calculations on the exchange rate that prevailed on the first day of each quarter rather than on the lower rates which existed on the dates of each transaction.

In Melamine, our appellate court held that it was in accordance with the intent of Congress and within the authority of Commerce to adopt rules which would take into account exchange rate variables rather than rely on a mechanical conversion formula in determining dumping margins in less than fair value investigations:

> The purpose of the antidumping law, as its name implies, is to discourage the practice of selling in the United States at LTFV by the imposition of appropriately increased duties. That purpose would be ill-served by application of a mechanical formula to find LTFV sales, and thus a violation of the antidumping laws, where none existed. A finding of LTFV sales based on a margin resulting solely from a factor beyond the control of the exporter would be unreal, unreasonable, and unfair.

732 F.2d at 933 (emphasis in original).

It is not reasonable for Commerce to find dumping by a firm with only ten relevant home market sales during the period of the investigation solely because of Commerce's

use of quarterly exchange rates. In this case the purpose of the antidumping laws would be violated if Commerce found a dumping margin based on the use of quarterly rates, while no margin would result if Commerce were to use the rates prevailing at the time of transactions.

At oral argument, the Court asked defendant whether the dumping margin of 1.16% would be reduced or eliminated if the exchange rates prevailing on the dates of the transactions had been used. Defendant filed with the Court a recalculation of the margin indicating that the margin would be .698%. Plaintiffs filed a motion to strike these calculations, objecting to the form and to alleged errors in the calculations. In response, defendant corrected one of the alleged errors, lowering the margin to .697. Since the Court orders the case remanded to Commerce on the merchandise

adjustment issue, plaintiffs' motion to strike the calculation is denied as moot. Plaintiffs will be afforded an opportunity to comment on the results of the remand. See Carlisle Tire & Rubber Co. v. United States, 5 CIT 229, 564 F.Supp. 834 (1983).

III. Conclusion

The case is remanded to Commerce for action consistent with this opinion. Commerce will supplement the record and file in the Court its redetermination within 45 days from the issuance of this memorandum opinion and order. Plaintiffs will file any comments on the results of the remand within 15 days of the filing of Commerce's redetermination, and defendant will respond within 10 days of the filing of plaintiffs' comments.

So ordered.

APPENDIX E

28 U.S.C.(d)(1)(A) Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in additon to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

(2)

Supreme Court, U.S.
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No. 87-1890

In the Supreme Court of the United States

OCTOBER TERM, 1988

LUCIANO PISONI FABBRICA ACCESSORI INSTRUMENTI MUSICALI, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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Petitioners contend that the court of appeals erred in affirming the lower court's finding that, for purposes of the Equal Access to Justice Act (EAJA), 28 U.S.C. (& Supp. IV) 2412(d)(1)(A), the government's position was "substantially justified."

1. Petitioners are the producer and the importer of pads for woodwind instrument keys from Italy. In 1984, the Department of Commerce issued an order assessing an antidumping duty on these pads, finding that petitioners were importing them at less than fair market value under the Tariff Act of 1930, 19 U.S.C. 1673d(a).[1] Pet. App. B3-B4. Petitioners sought judicial review of this

[1] The antidumping law is designed to remedy unfair trade practices by requiring the imposition of an additional duty on goods imported at less than fair value, determined by comparison with prices charged for the same goods on the home market (Pet. App. A2-A3, D2-D3).

determination in the Court of International Trade (CIT), which ruled that the Commerce Department was justified in initiating and continuing the antidumping investigation (Pet. App. D9-D12). The court did, however, fault the Department's analysis in two respects: The court found that the agency's failure to allow for differences in the local size ranges in comparing prices on the home market and in this country "was unreasonable and not in accordance with law" (*id.* at D17-D18), and that in making the required currency conversions, the agency's use of quarterly exchange rates rather than daily rates was "not reasonable" in light of the limited number of home market sales used for the comparison (*id.* at D21-D22). The CIT accordingly remanded the case to the agency for redetermination. Upon remand, the Department found that the average difference in price between home market and U.S. sales was de mininis and revoked the dumping order as to petitioners. *Id.* at A3-A4.

2. Thereafter, petitioners applied to the CIT for attorneys fees and expenses pursuant to EAJA. Noting that EAJA provides for an award of fees to a party who prevails in litigation against the government unless the government's position was "substantially justified," a test that the court of appeals had previously interpreted to require the government to show that its position was "*clearly* reasonable" (*Gavette* v. *Office of Personnel Management*, 808 F.2d 1456, 1467 (Fed. Cir. 1986) (emphasis in original)), petitioners asserted, as they do here, that since the court had found on the merits that the government's actions were unreasonable, the government's position could not have been "substantially justified" for EAJA purposes. The CIT disagreed. It explained that although the standard for review on the merits is whether the agency action is supported by substantial evidence (19 U.S.C.

1516a(b)(1)(B)), Congress in EAJA provided a separate standard, thus requiring "an analysis under an EAJA perspective [that is] independent from the decision on the merits" (Pet. App. B14). Undertaking that analysis, the court concluded that the size range issue was "novel and complex" and that the agency's determination "was clearly reasonable in light of the law, regulations and facts as they existed at the time" (*id.* at B20). Similarly, the court found that the agency's use of quarterly conversion rates was "clearly reasonable" on the particular facts in this case and that "in this evolving area of the antidumping laws Commerce did not persist in pressing a tenuous factual or legal position" (*id.* at B24). The CIT thus denied EAJA fees.

The Federal Circuit affirmed. Using the same analysis as the CIT, it rejected the proposition that the government's loss on the merits foreclosed it from demonstrating that its position was substantially justified for EAJA purposes (Pet. App. A8-A9). Examining the government's conduct "through the EAJA 'prism' " (*id.* at A9, quoting *Federal Election Comm'n* v. *Rose*, 806 F.2d 1081, 1090 (D.C. Cir. 1986)), the Federal Circuit reviewed the facts, the pertinent regulations and the case precedents (Pet. App. A11-A18), and determined that the CIT's conclusion that the government's position was substantially justified was not clearly erroneous. Indeed, it concluded that "[a]part from [petitioners'] attempted equation of the government's loss on the merits with its entitlement to fees and expenses, nothing was argued to us that would suggest the court was wrong in [its] assessment" (*id.* at A18-A19).

3. The decision below is entirely consistent with this Court's decision in *Pierce* v. *Underwood*, No. 86-1512 (June 27, 1988), decided after this petition was filed. Further review is accordingly not warranted.[2]

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[2] *Pierce* v. *Underwood, supra,* resolved any prior conflict in the circuits about whether the EAJA "substantial justification" standard

a. Petitioners' contention that the CIT's holding on the merits is dispositive of the substantial justification determination is precluded by the reasoning of this Court in *Pierce* v. *Underwood, supra.* As the Court there stated, "a position can be justified even though it is not correct, and we believe it can be substantially (*i.e.*, for the most part) justified if a reasonable person could think it correct, that is, if it has a reasonable basis in law and fact" (slip op. 12 n.2).[3] This is precisely the approach followed by the courts below in this case. As the court of appeals noted, the decision on the merits reflects the application of a different standard of review, which is not controlling on the EAJA issue, "regardless of the words chosen to announce

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requires a showing of something more than reasonableness (see Pet. 9-10). In light of *Pierce*, it is clear that to meet the EAJA test, the government's position must have simply "a 'reasonable basis both in law and fact' " (slip op. 12 (citation omitted)).

Petitioner's alternative contention (Pet. 10-11) that the decision below is somehow inconsistent with *Federal Election Comm'n* v. *Rose*, 806 F.2d 1081 (D.C. Cir. 1986), is entirely without merit. The court in *Rose* refused to equate a finding on the merits that the government's action was arbitrary and capricious with a lack of substantial justification for EAJA purposes. Relying on a substantially similar analysis, the court below refused to equate a finding on the merits that the government's action was unreasonable in the sense that it was unsupported by substantial evidence with the EAJA standard (Pet. App. A6-A11).

Finally, to the extent that the Third Circuit had, before *Pierce*, accepted the analysis advocated by petitioner, that circuit has been directed to reconsider its position in light of *Pierce*. See *Russell* v. *Heckler*, 814 F.2d 148 (1987), vacated and remanded, No. 86-251 (June 30, 1988). See also *Trahan* v. *Regan*, 824 F.2d 96, rehearing en banc granted, 832 F.2d 158 (D.C. Cir. 1987).

[3] See also slip op. 7, noting that the EAJA question "will not be precisely the same as [the question on] the merits: [the EAJA question will be] not what the law now is, but what the Government was substantially justified in believing it to have been."

[the merits] conclusion" (Pet. App. A8). See also *Hadden* v. *Bowen*, No. 87-1469 (10th Cir. July 20, 1988), slip. op. 5-6.

b. Petitioners' final contention (Pet. 12-13), that the government's position in this case was not substantially justified, is entirely factbound. In any event, both courts below evaluated the government's position on both points that led to the remand and concluded that the government had acted reasonably in light of the facts and legal precedent available to it at the time.[4] There is no need for further review of that question.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

AUGUST 1988

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[4] The Federal Circuit conducted its review of the lower court's finding under the "clearly erroneous" standard because it concluded that the determination that the Government's position was "substantially justified" under the EAJA was a factual one (Pet. App. A10-A11). In *Pierce* v. *Underwood*, this Court established that the proper standard for review in EAJA cases is "abuse of discretion" (slip op. 9). We do not believe that any possible theoretical difference in the two standards of review could lead to a difference in result in this case, where the court of appeals concluded that "Commerce considered the issues in a thoughtful and thorough manner" (Pet. App. A14), and "carefully considered the issues * * * and provided reasonable explanations for its approach" (*id.* at A18).

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